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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 370.

MARIAN S. HONEYMAN,

Appellant,

vs.

HERBERT G. HANAN, as Executor of the Last Will and Testament of Herbert W. Hanan, Deceased,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

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Statement.

This action is upon a written instrument evidencing a loan made by appellant's guardians to appellee's testator, and others, in *1920,* secured by the pledge of a bond and mortgage made and executed in *1907* by the John H. Hanan Realty Company owned by the borrowers upon a loft building at the corner of Bleecker and Elizabeth Streets, New York City.

Upon default in payment of interest and appellee's testator having died, appellant foreclosed upon her security and sold the mortgaged property and exhausted her remedies upon

the bond of the Hanan Company, as required by the law of New York, and then brought this action to establish her claim against decedent's estate.

This action is not a foreclosure action, nor is it an action to recover upon the mortgage debt.

The appellee did not answer the complaint or the amended complaint and no issue exists.

Upon motion, at Special Term, the complaint was dismissed with costs, the Court handing down a memorandum as follows:

> "A motion by defendant to dismiss the amended complaint is granted. The mortgage moratorium laws apply to the facts alleged in the said complaint."

Upon appeal, the judgment was affirmed by the Appellate Division without memorandum or opinion, and likewise was affirmed by the Court of Appeals without memorandum or opinion. The remittitur of the Court of Appeals was amended upon motion to read as follows:

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States."

Argument.

Appellee argues (p. 9 of his brief) that it is "Chapter 793 of the Laws of 1933, the constitutionality of which is not questioned, which precluded the plaintiff's action and made her complaint dismissable on motion."

An examination of Chapter 793, set forth in the appendix to appellee's brief, discloses that it deals with bonds and mortgages that are past due but *not* in default as to interest

and taxes and foreclosure is prohibited or stayed so long as no such default exists. Our action to foreclose was not prohibited or stayed, and we were not affected in the least by any provision of Chapter 793.

Chapter 794 of the Laws of 1933—a separate act of the legislature—was held to bar our action on the obligation on which this action is brought. This chapter adds §1083-a and §1083-b to the Civil Practice Act, and is set forth in full in the appendix annexed hereto.

Section 1083-a limits deficiency judgments in foreclosure.

Section 1083-b limits judgment in an action other than to foreclose.

The amended complaint alleges in substance that in our action to foreclose our collateral security we exhausted our remedy against the John H. Hanan Realty Company, obligor on the 1907 bond, by asking for a deficiency judgment and that the application was denied. The New York courts have now held that this denial of deficiency judgment is a bar to the maintenance of this action. It is obvious then that Chapter 793 can have no direct application to the questions raised in this action and the certificate of the Court of Appeals that

> "A question under the Federal Constitution was presented and necessarily passed upon by this court. The plaintiff contended that chapter 794 of the Laws of the State of New York, enacted in 1933, as amended (Secs. 1083-a and 1083-b of Civil Practice Act), impair the obligations of contracts, and thus violate article 1, section 10, of the Constitution of the United States. This court held that such laws do not violate said provision of article 1, section 10, of the Constitution of the United States,"

is a correct statement.

Appellee argues that regardless of the constitutionality of Chapter 794 the complaint would still have been dismissable because of §1078 of the Civil Practice Act.

That section of the Civil Practice Act relates solely to a mortgage debt and does not refer in any way to primary or unconditional obligations for which a bond and mortgage

was given as security, as is the case at bar. Here, the mortgage debt was that of the John H. Hanan Realty Company and not the loan made by appellant to the appellee's testator.

Appellee likewise argues that by pursuing our action to foreclose we had the advantage of Chapter 794 of the Laws of 1933, and that we may not now question the constitutionality of that act.

We have never claimed, and do not now claim that the legislature may not dictate procedure and may not modify procedure as well. The appellant obtained no advantages whatever from Chapter 794 of the Laws of 1933 in her foreclosure action. That act contains only limitations—not advantages to mortgagees. She had the right to foreclose long before Chapter 794 was passed, and she has always had the right to apply for a deficiency judgment, a right that could not be destroyed by the legislature.

So far as the mortgage debt of the Realty Company was concerned, it was useless for the appellant to proceed further. All that is of concern here is that appellee may not say that appellant has not first exhausted her legal remedies, whether constitutional or not.

Chapter 794 of the Act of 1933, passed by the Legislature of the State of New York, is clearly unconstitutional as applied to the facts in the case at bar.

At the time appellant loaned money to appellee's testator and took his unconditional promise to repay the same, together with a bond and mortgage of the Hanan Realty Company made and executed thirteen years before, as security, she relied upon the existing laws of the State of New York.

In *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, this Court said (p. 60):

> "To know the obligation of a contract we look to the laws in force at its making (citing cases). * * * Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression.

> Even when the public welfare is invoked as an excuse, these bounds must be respected. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433. * * * A catalogue of the changes imposed upon this mortgage must lead to the conviction that the framers of the amendments have put restraint aside. With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor."

In *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, this Court said (pp. 433-434):

> "In *Home Bldg. & L. Asso.* v. *Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy the *repudiation of debts or the destruction of contracts or the denial of means to enforce them.*' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, *that action must be limited by reasonable conditions appropriate to the emergency.* Accordingly, in the Blaisdell case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*
>
> "'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied, to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, this Court, referring to its decision in *W. B. Worthen Co.* v. *Kavanaugh,* said (p. 581):

> "But the statutory command that the mortgagor should not lose his property on default had always

> rested on the assumption that the mortgagee would be compensated for the default by a later payment, with interest, of the debt for which the security was given; and the protection afforded the mortgagor was, in effect, the granting of a stay. No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full."

The New York legislature has gone much further than merely prohibiting foreclosure so long as interest and taxes are paid during a temporary period of emergency.

The New York Court of Appeals say in *City Bank Farmers Trust Co.* v. *Ardlea*, 267 N. Y. 225, that

> "Sections 1083-a and 1083-b were enacted at the same time as sections 1077-a and 1077-b and as part of the general purpose of affording relief to distressed debtors. * * * Section 1083-a prevents a deficiency judgment when the court finds that the fair market value of the premises covered by the mortgage equals or exceeds the amount specified in the judgment and prior liens. Section 1083-b affords the same protection, in actions against makers or guarantors of bonds, 'against any person or corporation directly or indirectly or contingently liable therefor.'"

If the mortgagor should not pay any interest or taxes for any reason whatsoever, certainly the mortgagee should do something for his own protection. The necessities of the mortgagee may be fully as great, if not greater, than the mortgagor. If both mortgagee and mortgagor do nothing the debt due the mortgagee will increase at an alarming rate. The mortgagee *must* do something to save himself the utter loss of his security and his entire debt. If he proceeds to foreclosure and sale—and there is nothing to prevent—he obtains whatever the property brings or the property itself, which he may not want. The property may have become largely depreciated and may not earn enough to pay taxes, which is the case at bar.

Now, the New York statute says (§1083-a) that

> "No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided."

The statute then states that within ninety days after the date of sale a motion may be made for a deficiency judgment and the Court shall determine "the fair and reasonable market value of the mortgaged premises as of the date of sale" and shall limit the deficiency judgment accordingly, and adds:

> "If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."

Under §1083-b, if the mortgagee does not foreclose but sues on the bond or any guaranty or indemnity, the value of the property to be determined by the Court may be offset or credited against the amount due the mortgagee. In other words, a penalty is imposed upon a mortgagee who dares to sell in foreclosure during the emergency when in all conscience he *must* do something to protect himself against a defaulting debtor and the penalty is a loss of his contract rights, appellant has been deprived of his contract rights—not *temporarily,* but *absolutely and forever.*

The mortgagor guarantor is not required to come in and show that he is a "distressed" debtor.

The Court of Appeals in *Sliosberg* v. *New York Life Ins. Co.,* 244 N. Y. 482, at 498, wrote:

> "That a debtor has lost the wherewithal to pay is no defense, whether its loss is attributable to simple robbery or to piracy which has been coated white by legislation."

He is not required to trustee his property, as security, but is given relief which is neither "temporary or on condition."

As this Court said in *Worthen* v. *Thomas* (*supra*):

> "The act contains no limitation as to time, amount, circumstances, or need."

In *Murray* v. *Marshall*, 94 N. Y. 611, the owner and mortgagor of property conveyed, subject to the mortgage, and the owner of the bond and mortgage extended the time to pay to the vendee of the property. The Court said:

> "When the creditor extended the time of payment by a valid agreement with the grantee, he at once, for the time being, took away the vendor's original right of subrogation. He suspended its operation beyond the terms of the mortgage. He put upon the mortgagor a new risk not contemplated and never consented to. The value of the land, and so the amount to go in exoneration of the bond, might prove to be very much less at the end of the extended period than at the original maturity of the debt, and the latter might be increased by an accumulation of interest. The creditor had no right thus to modify or destroy the original right of subrogation." (Cited and approved in *Commercial Casualty Ins. Co.* v. *Roman*, Jan. 8, 1926, 269 N. Y. 451.)

We frequently read that the delay in reaching cases for trial amounts to a denial of justice. (*Matter of Raymond* v. *Davis*, 248 N. Y., at p. 72.)

If a creditor's act in extending time, thereby imposing a new risk upon a surety, is a modification or destruction of a contract right, why is not an act of the legislature extending time, imposing new risks, limiting deficiencies and giving courts power to satisfy debts, equally an impairment of contract rights?

Where, in appellant's contract with the appellee's testator, does she agree that the Court may determine the value of the property and that the debt is to be paid in full or to the extent that the Court may direct? The guarantor may be good to-day, hopelessly involved financially to-morrow. Many mortgages are sold upon the faith of the guaranty. If a debtor is really distressed he has a remedy by bank-

ruptcy, but the legislature of the State of New York has no power to give to a distressed debtor the benefits of the Bankruptcy Act.

The New York Moratorium Laws have been extended from year to year until now they run to July, 1937, with a provision, where interest and taxes are paid, that principal sums will not become due for another year; that is to say, July, 1938. May a legislature indefinitely prolong an intolerable mortgage situation which has been created by the act of the legislature itself?

This Court certainly has jurisdiction—and should exercise it.

The motion to dismiss must be denied.

Respectfully submitted,

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